88-1473 (1)

Supreme Court, U.S.
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CLERK

IN THE
SUPREME COURT OF
THE UNITED STATES OF AMERICA
OCTOBER TERM,1988

BOWLINE CONSTRUCTION COMPANY,
RABON MARTIN AND PAUL E. GARRISON,

Petitioner,

VS.

CAPCO PIPE COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

C. Rabon Martin
Paul E. Garrison
1023 West 23rd Street
Tulsa, Oklahoma 74107
(918) 587-9000
ATTORNEYS FOR PETITIONERS.

38pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Oklahoma Supreme Court has construed Oklahoma's post-judgment interest statute in an unconstitutional manner by denying interest on an attorney fee after an unsuccessful four year attack thereon.

2. Whether the arbitrary refusal of the Oklahoma Supreme Court to award appellate attorney fees to counsel for the prevailing party, as provided for by statue, is a violation of due process or equal protection under the United States Constitution.

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

BOWLINE CONSTRUCTION COMPANY,
RABON MARTIN and PAUL E. GARRISON,

Petitioners,

vs.

CAPCO PIPE COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

The Petitioners, Bowline Construction Company, Rabon Martin and Paul E. Garrison petition this Honorable Court for a Writ of Certiorari to the Supreme Court of the State of Oklahoma, to review the constitutional infirmities in the adverse ruling of that court hereinafter delineated and, in support hereof, respectfully state:

OPINION BELOW

The ruling of the Oklahoma Supreme Court was issued without opinion.

JURISDICTION

1. The decision complained of was initially rendered August 17, 1984.

2. The Intermediate Court of Appeals of the State of Oklahoma upheld the decision of the trial court originally

complained of by Opinion rendered and filed April 19, 1988.

3. A timely Petition for Rehearing was denied by the Intermediate Court of Appeals on June 10, 1988.

4. A timely Petition for Certiorari was presented to the Supreme Court of Oklahoma on June 30. 1988 and was denied October 19, 1988. This petition was timely submitted to this Honorable Court but was returned for correction to conform to size and format rules.

5. Jurisdiction to entertain this Writ is conferred by 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. Constitution Amend. V. "No person shall be...deprived of life, liberty, or property, without due process of law..."

2. U.S. Constitution Amend. VIV. "No state shall...deprive any person of life, liberty, or property, without due process of law...nor deny to any person within its jurisdiction the equal protection of the laws."

3. 12 O.S. §681. "A judgement is the final determination of the rights of the parties in an action."

4. 12 O.S. §727A. "All judgments of courts of record shall bear interest..."

5. 12 O.S. §933. "The several clerks of the District Court shall tax the costs in each case, and insert the same in their respective judgments..."

6. 12 O.S. §936. "In any civil action to recover on . . . a contract relating to the purchase or sale of goods , wares, or merchandise. . .the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs."

7. 12 O.S. §968 "No proceeding to reverse, vacate or modify any judgment or final order. . .shall operate to stay execution, unless the Clerk of the Court in which the record of such judgment or final order shall be, shall take a written undertaking, to be executed on the part of the plaintiff in error,

to the adverse party, with one or more sufficient sureties. . .The amount of such undertaking shall be for the whole amount of the judgment or order including costs and interest on the appeal.

STATEMENT OF THE CASE

This action was originally filed in 1969 by Bowline Construction Company, a utility contractor, after Bowline had purchased from CAPCO plastic pipe and glue to be utilized in construction of an 82-mile rural water distribution system in Ralls County, Missouri, and the product proved to be defective. After years of discovery and one mistrial, the case was finally tried before a jury in 1979 and 1980, resulting in a $325,000 recovery.

Under Oklahoma law, the prevailing party is by statute entitled to recover an attorney fee, to be set by the court and taxed as a cost of the action.

After an evidentiary hearing, the trial court determined that plaintiff's two attorneys should receive a total of $346,000 for their combined thirty-four (34) years work on the case. Capco appealed as to the amount only and superseded collection of the fee by posting a bond. The bond made no provision for interest but was approved over Bowline's objection to that omission. Bowline counter-appealed from the order approving the bond without a provision for interest. Oklahoma's Intermediate Court of Appeals affirmed and the Oklahoma Supreme Court denied certiorari, although the fee award was affirmedd in its entirety.

After winning the appeal, Bowline filed a motion to tax as costs a reasonable fee for its attorneys' appellate services. The Oklahoma Supreme Court denied this application without explanation.

The federal questions were first raised in the Petition-In-Error filed in the Oklahoma Supreme Court, in which Bowline asked the Oklahoma Supreme Court to reconsider its decision in McAlester Urban Renewal Authority v. Hamilton, 521 P.2d 823 (Okl. 1974), in which Oklahoma's post-judgment interest statute was construed to be inapplicable to taxed costs.

ARGUMENT

Petitioner respectfully urges that certiorari be granted for the reasons hereinafter set forth:

Within the context of appeals of attorney fees taxed as a cost of the action, the Oklahoma Supreme Court has, by a gross and obvious mis-construction of Oklahoma's post-judgment interest and supersedeas bond statutes, deprived appellees in such proceedings of procedural due process of law, by establishing an appellate format in which one litigant cannot lose, and the other cannot win.

Oklahoma law (12 O.S. §681) defines a judgment as "The final determination of the rights of the parties in an action."

Title 12 O.S. §936 allows the prevailing party in certain actions to recover an attorney fee, to be taxed as a cost of the action.

Title 12 O.S. §933 directs that the court shall tax the costs and "...insert the same into judgment."

Title 12 O.S. §727 provides that, "all judgments of courts of record shall bear interest..."

Title 12 O.S. §968 provides for the posting of a supersedeas bond to stay execution pending appeal and requires that such bond "...shall be for the whole amount of the judgment or order including costs and interest on the appeal.

In McAlester Urban Renewal Authority v. Hamilton, 521 P.2d 823 (Okl. 1974), the Supreme Court of Oklahoma held that an order awarding attorney fees as a cost of the action was not a "judgment," so as to come within the ambit of 12 O.S. §727, providing that all judgments should bear interest.

Certiorari should be granted by this Honorable Court to review the Oklahoma Supreme Court's interpretation of these statutes because the end result of the application of this interpretation is a rank denial of procedural due process of law to appellees victimized thereby. In the instant case, counsel for Bowline, co-petitioners herein, were awarded a fee of

$346,000 on July 20, 1984. Although admitting liability for a fee of some amount, Capco appealed the $346,000 award as allegedly excessive and superseded collection of the judgment by posting a bond which made no provision for interest, contrary to 12 O.S. §968. Appeals were finally resolved and the award became payable on October 19, 1986, when the Oklahoma Supreme Court denied certiorari. At Oklahoma's applicable post-judgment interest rates, Capco should have owed approximately $148,000 of interest. Only because of the Oklahoma Supreme Court's distorted and inequitable interpretation of the applicable statutes did Capco escape this liability and thereby profit from its totally unsuccessful appeal to that extent. Conversely, the prevailing attorneys who successfully withstood Capco's appeal, have suffered a loss of approximately $148,000. As can be clearly seen, the Oklahoma Supreme Court has, through its interpretation of these statutes, created with respect to appeals of attorney fees taxed as costs, a forum in which the appellant will surely profit and the appellee will surely suffer, no matter how the merits are disposed of. It is respectfully submitted that such a forum is so fundamentally unfair as to deny procedural due process of law.

To add insult to injury, after the fee award was affirmed in its entirety, the Oklahoma Supreme Court denied without explanation or comment a motion to tax an additional fee for the legal services rendered in defending the award on appeal, notwithstanding its decision in Sisney v. Smalley, 690 P.2d 1048 (Okl. 1984), in which it was held that additional fees are recoverable by the prevailing party for legal services rendered in the appellate court. Further, in State Ex Rel. Burk v. City of Oklahoma City, 598 P.2d 659 (Okl. 1979), the Oklahoma Supreme Court specifically held that "...attorneys seeking a fee are entitled to reasonable fees for time spent on the application for their fee and in defense of this appeal." (emphasis added) In light of such decisions, the refusal to award such additional fees without comment or explanation could only be deemed

arbitrary and capricious. This Honorable Court has held that a statute may be constitutionally invalid as applied, when it is construed to deprive an individual of his protective right, although the general validity of the statute is beyond question. Little v. Streater, 452 U.S. 1, 68 L.Ed.2d 627, 101 S. Ct. 2202 (1981). As attorneys are entitled to additional fees for defending an appeal of fees allowed in the trial court, this right should apply to all attorneys in all cases and the benefits of this right may not be arbitrarily withheld from a particular attorney in a particular case without violating the equal protection clause.

This Honorable Court has previously held that a State Supreme Court, in construing a state statute, may cause a violation of the due process clause if the error committed is so gross and obvious that it comes close to the boundary of arbitrary action. See, Bouie v. Columbia, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct.1697 (1964) and Roberts v. New York City, 295 U.S. 264, 79 L.Ed. 1429, 55 S.Ct. 689 (1934).

The constitutional guarantee of procedural due process embodies an obligation to resolve all conflicts in a manner "consistent with essential fairness." Lassiter v. Dept. Of Social Services, 452 U.S. 18, 68 L.Ed.2d 640, 101 S.Ct. 2153 (1981). A system in which one party cannot win and the other cannot lose is indisputable short of that standard.

CONCLUSION

This Honorable Court should grant certiorari to review decisions of the Oklahoma Supreme Court in this case and referred to herein for the reason that the establishment of an appellate forum in which one litigant cannot win and the other cannot lose is so fundamentally offensive to American Jurisprudence that it demand to be rectified. Further, the arbitrary refusal to grant additional legal fees to the prevailing party for appellate services smacks of retaliation against petitioner's attorneys for displaying the affrontery to challenge the court's fairness. To leave these decisions standing

unremedied is to effectively approve the transmogrification of Oklahoma Jurisprudence from a system of laws to a system of men.

Respectfully submitted,
C. Rabon Martin
Martin & Turner
1023 West 23 Street
Tulsa, OK 74107
(918) 587-9000
and
Paul Garrison
6960 West Peoria, No. 114
Peoria, AZ 85345
(602) 979-6621
ATTORNEYS FOR PETITIONERS

APPENDIX A

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

BOWLINE CONSTRUCTION COMPANY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
THE AETNA CASUALTY AND SURETY COMPANY, et al.,	)	
	)	
Defendants.	)	C-69-1778

ORDER

This matter coming on to be heard this 16th day of August, 1984, before the Court upon the application for approval of supersedeas bond of the defendant, CAPCO Pipe Company, Inc. The plaintiff appears by Mr. Paul E. Garrison, Attorney, and the defendant, CAPCO Pipe Company, Inc., appears by Mr. G. Michael Lewis, Attorney. The Court having heard arguments of counsel and specifically the plaintiff's objection to the amount of the bond as not including a projection of interest, finds that said bond should be approved in the principal amount of the attorney fees, without projecting interest thereon.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the supersedeas bond in the principal amount of $346,000.00, the attorney's fee awarded herein, should be and is hereby approved without the projection of interest thereon with an exception allowed to the plaintiff herein.

S/_____
RONALD SCHAFFER, JUDGE

APPROVED AS TO FORM:

PAUL E. GARRISON and
C. RABON MARTIN
BYs/_____
Paul E. Garrison
Attorneys for Plaintiff

DOERNER, STEWART, SAUNDERS,
DANIEL & ANDERSON

BYs/_____
G. Michael Lewis
Attorney for Defendant
CAPCO Pipe Company, Inc.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

BOWLINE CONSTRUCTION CO.,	)	
	)	
Counter-Appellant,	)	
	)	
vs.	)	
	)	
CAPCO PIPE COMPANY, INC., formerly CEMENT ASBESTOS PRODUCTS COMPANY,	)	
	)	
Counter-Appellees.	)	No. 66,915

COUNTER-PETITION-IN-ERROR (AND PRELIMINARY STATEMENT)

A. TRIAL COURT HISTORY

COURT: District CASE NO. C-69-1778

COUNTY: Tulsa JUDGE: Ronald L. Shaffer

DATE JUDGMENT OR ORDER APPEALED PRONOUNCED: August 16, 1984, as supplemented by trial judge's order after remand of June 20, 1986.

POST-TRIAL MOTION: No

DATE OF DISPOSITION OF POST-TRIAL MOTION OR MOTIONS: N.A.

B. DISPOSITION IN TRIAL COURT

NATURE OF JUDGMENT OR ORDER COUNTER-APPELLANT SEEKS TO REVERSE:

Denial of objection to supersedeas bond and approval of same without provision for interest.

RELIEF SOUGHT BY COUNTER-APPELLANT:

Counter-Appellant sought to have the supersedeas bond include a provision to secure payment of interest accruing on the judgment for attorney fees awarded as costs.

RELIEF GRANTED:

The trial court held that an attorney fee awarded as a cost of the action would not bear interest while said award was being appealed and while collection was superseded, and therefore overruled Counter-Appellant's objection to the supersedeas bond's failure to provide for the post-judgment interest.

RELIEF SOUGHT BY COUNTER-APPELLEE:

The Counter-Appellee sought approval of supersedeas bond including no provision for interest.

RELIEF GRANTED:

The bond was approved without any provision for interest.

C. SUMMARY OF CASE

This action was originally filed in 1969. After a previous mistrial, the case proceeded to jury trial in 1980. In early 1981, after ten and one-half weeks of trial, the jury returned with a verdict for Bowline in the amount of $325,000.00. The verdict was subsequently set aside by the trial court for the failure of Bowline to agree to a remittitur of just over $161,000.00. That decision was successfully appealed and the jury's verdict was reinstated. The judgment has been paid.

On July 20, 1984, after hearing testimony with respect thereto the trial court awarded Bowline an attorney fee of $346,000.00. That judgment is now on appeal by Capco.

Capco posted a supersedeas bond to cover payment in the amount of $346,000.00, which made no provision for post-judgment interest accruing on the award of attorney fees and Bowline objected thereto, but the same was approved and Bowline appealed.

On February 4, 1986, the Court of Appeals remanded the case to the trial court with instructions to supplement its order of June 20, 1984 with specific findings of fact and conclusions of law. Bowline's consolidated appeal relating to the denial of interest was not reached. On June 20, 1986, the

trial court reaffirmed its attorney fee award of $346,000.00, effective as of the date of the original award July 20, 1984 and further provided that, if this Honorable Court should determine that the award would bear interest, said interest would run from the date of the original award July 20, 1984.

Capco has lodged another appeal from the supplemented Order and Bowline now re-appeals the approval of the bond without a provision for interest.

D. ISSUES AND ERRORS RAISED ON APPEAL

1. Whether the Oklahoma Supreme Court should reconsider its decision in McAllister Urban Renewal Authority vs. Hamilton, 521 P.2d 823 (Okl. 1974), wherein it was held that an award of attorney fees, which are taxed as a cost of the action, would not bear interest pending appeal.

2. Whether the Supreme Court's decision in McAllister Urban Renewal, supra, deprives a judgment creditor of equal protection of the law, as guaranteed by the Fourteenth Amendment to the United States Constitution.

3. Whether the decision in McAllister Urban Renewal, supra, is contrary to public policy, as encouraging frivolous appeals.

4. Whether, McAllister Urban Renewal, supra, notwithstanding the posting of a supersedeas bond subjects the obligor under an award of costs to liability for interest under 12 O.S. §968.

ANY RELATED OR PRIOR APPEALS: Yes

1. Precision Polymers, Inc. v. Nelson. Original proceeding in Supreme Court 512 P.2d 811 (Okla. 1973).

2. Cement Asbestos Products Co. v. Precision Polymers, Inc. Case No. 47315.

3. Bowline Construction Company v. Richard Armstrong, Judge. Case No. 54792.

4. Bowline Construction Company v. Capco Pipe Co., Inc., Case No. 57090.

5. Capco Pipe Co., Inc. v. Bowline Construction Co., Appeal No. 62,895.

6. Bowline Construction Co. v. Capco Pipe Co., Inc., Appeal No. 63,066 (consolidated with surviving No. 62, 895).

Court Reporter's estimate of number of transcribed pages; 184 pages for July 16-20, 1984; 38 pages for the remand proceedings on May 13, 1986.

E. IS COUNTER-APPELLANT WILLING TO PARTICIPATE IN AN ATTEMPTED SETTLEMENT OF THE APPEAL BY PREDECISIONAL CONFERENCE UNDER COURT OF APPEALS RULE 3.7 IF OFFERED THE OPPORTUNITY: Yes

F. IS COUNTER-APPELLANT AGREEABLE TO ACCELERATE PROCEDURES FOR THIS APPEAL UNDER COURT RULE: Yes

---

G. NAME OF COUNSEL

For Counter-Appellant:
Name: C. Rabon Martin
Firm: Martin, Turner & Zeigler
Address: 1023 W. 23rd St.
Tulsa, OK 74107-2819
Telephone: (918) 587-9000
Name: Paul E. Garrison
Firm: Garrison & Comstock, Inc.
Address: 1509 S. Victor
Tulsa, OK 74104
Telephone: (918) 744-5757

For Counter-Appellee:
Name: G. Michael Lewis
Albert J. Givray
Firm: Doerner, Stuart,Saunders, Daniel& Anderson
Address: 1000Atlas Life Bldg.
Tulsa, OK. 74103
Telephone: (918) 582-1211

H. DATE: July 21, 1986

Verified by:

S/_____
C. Rabon Martin
Martin, Turner & Zeigler
1023 W. 23rd St.
Tulsa, Ok 74107-2819
(918) 587-9000

AFFIDAVIT OF MAILING TO COUNTER-APPELLEE AND DISTRICT COURT CLERK ON DAY OF FILING IN SUPREME COURT.

I hereby certify that a true and correct copy of the

above and foregoing Petition-in-Error was mailed this _____ day of _____, 1986 to G. Michael Lewis & Albert J. Givray, Doerner, Stuart, Saunders, Daniel & Anderson, at 1000 Atlas Life Bldg., Tulsa, OK 74103, by depositing it in the U.S. mails, postage prepaid.

I further certify that a copy of the above and foregoing Petition-in-Error was filed in the Office of the Court clerk of Tulsa County on the _____day of _____, 1986.

s/_____
C. Rabon Martin

APPENDIX C

IN THE COURT OF APPEALS, DIVISION 2
STATE OF OKLAHOMA

BOWLINE CONSTRUCTION CO.,	)	
	)	
Appellee and	)	
Counter-Appellant,	)	
	)	
vs.	)	No.66,915
	)	
CAPCO PIPE COMPANY, INC.,	)	NOT FOR
	)	PUBLICATION
formerly CEMENT ASBESTOS	)	
PRODUCTS COMPANY,	)	
	)	
Appellant and	)	
Counter-Appellee.	)	

APPEAL FROM THE DISTRICT COURT OF
TULSA COUNTY, OKLAHOMA
Honorable Ronald L. Shaffer, Trial Judge

C. Rabon Martin Tulsa, Oklahoma
Paul E. Garrison
Tulsa, Oklahoma — For Appellee and Counter-Appellant

Sam P. Daniel, Jr.
C. Michael Lewis
Albert J. Givray
Doerner, Stuart, Saunders,
Daniel & Anderson
Tulsa, Oklahoma — For Appellant and Counter-Appellee

MEMORANDUM OPINION

BACON, P.J.

This case has been in court for nearly twenty years. This is the second appeal from an order of the trial court awarding attorney's fees for the first trial that lasted some twenty-seven days and resulted in a mistrial. The second trial commenced in November 1980 and continued for thirty-five actual trial days. Bowline was awarded damages of $325,000. The trial court overruled Capco's motion for new trial subject to a remittitur of $161,090. Bowline rejected the remittitur, and the trial court ordered anew trial. Bowline appealed from this order. The appellant court reinstated the verdict of the jury which was subsequently paid by the defendant, Capco.

A timely motion to tax costs, which included attorney's fees, was filed by Bowline. Lengthy hearings were conducted by the trial court on July 16 and 20, 1984, as to the attorney's fees due counsel employed by Bowline. The trial court ordered Capco to pay the sum of $346,000, $200,000 to Mr. Garrison and $146,000 to Mr. Martin.

Capco in turn appealed this order, and in an unpublished memorandum opinion dated February 4, 1986, the Court of Appeals, Tulsa Divisions, Case No. 62,895, consolidated with Case No. 63,066, reversed the trial court. The reason for reversal was Oliver's Sports Center v. National Standard Insurance, 615 P.2d 291 (Okla. 1980), and State ex rel. Burk v. Oklahoma City, 598 P.2d 659 (Okla. 1979).

The thrust of the appellate opinion was that the order was void of factors for the appellate court to ascertain whether the criteria used to compute the attorney's fees were reasonable and appropriate. Absent these factors, the order was incapable of review. The appeals court noted that the Burk requirements would only apply prospectively from the date of the Burk opinion.

On the remand, the trial court reached the same conclusion as previously reached. Capco again appeals.

There are no detailed time records available for either the period prior to the Burk decision thereafter. Capco takes the position that the absence of such detailed time records in the post-Burk period of this lawsuit forecloses the award of any attorney's fees or, at the very most, one-third of the fee awarded. We conclude such reasoning is untenable.

On remand from the first appeal, the trial court make comprehensive findings based on reconstruction of Bowline's counsels' files and court files. There is no question that Bowline's counsel were capable, competent and experienced, and the hourly rate applied by the trial court was well within the community norm.

The trial court heard the evidence presented at the proceedings on July16 and 20, 1984, and arrived at the base compensatory fee for Mr. Garrison and Mr. Martin. To this, the trial court added a "bonus" or "incentive" fee of forty percent to Mr. Garrison's base compensatory fee and twenty percent to Mr. Martin's base compensatory fee.

The trial court has set forth with specificity the facts and computations for the reasonableness of the attorney's fees awarded under the standards set forth in Oliver's Sports Center, Inc. v. National Standard Insurance Co., 615 P.2d 291 (Okla. 1980), and State ex rel. Burk v. Oklahoma City, 598 P.2d 659 (Okla. 1979).

There is no competent evidence which supports the judgment, and we find no abuse of discretion on the part of the trial court.[1]

We affirm the trial court as to the judgment of $346,000 in attorney's fees to be taxed as costs.

---

[1] No purpose can now be served to keep remanding the case for evidence that does not exist. Under the circumstances of this case, it would appear that an appellate court could take judicial notice of the fact that the fee awarded was not an excessive fee or an abuse of discretion.

The trial court awarded Bowline interest on the award of attorney's fees. Capco appeals from that ruling.

Bowline seeks interest on attorney's fees. Attorney's fees that are treated as costs do not bear interest unless specifically provided for by statute. McAlester Urban Renewal Authority v. Hamilton, 521 P.2d 823 (Okla. 1974). In National Educators Life Insurance Co. v. Apache Lanes, 555 P.2d 6000 (Okla. 1976), the court stated that the prevailing party under 12 O.S. 1981 §936, is entitled to reasonable attorney's fees, that they are to be taxed as costs, and that absent any statutory authority, interest on costs cannot be permitted.

Bowline's request for interest on attorney's fees taxed as costs is denied, and that portion of the trial court's judgment awarding interest on attorney's fees from July 20, 1984, is reversed.

AFFIRMED IN PART AND REVERSED IN PART.

MEANS, C.J., and STUBBLEFIELD, J. (sitting by designation), concur.

APPENDIX D

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

BOWLINE CONSTRUCTION CO.,	)
	)
Petitioner,	)
	)
vs.	)
	)
CAPCO PIPE COMPANY, INC.,	)
formerly CEMENT ASBESTOS	)
PRODUCTS COMPANY,	)
	)
Respondent.	)

No. 66,915

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS, DIVISION

COMES NOW the Petitioner, Bowline Construction Co., by its undersigned attorneys, and petitions this Court for a Writ of Certiorari to Division 2 of the Court of Appeals of the State of Oklahoma, to review that Court's decision denying Petitioner relief. In support hereof, Petitioner states:

1. The opinion of which Petitioner seeks review was unpublished and a copy thereof is apprehended hereto in accordance with Rule 3.14.

2. The opinion was rendered and filed April 19, 1988. Rehearing was denied on June 10, 1988, and said Order was filed June 13, 1988.

3. The question presented for review is whether the denial of post-judgment interest on an attorney fee of $346,000, taxed as a cost of the action, and superseded pending appeal, constitutes error. It is submitted that the opinion of the Court of Appeals, approving the denial of post-

judgment interest, is not in accord with applicable decisions of the Supreme Court of the United States. This Court is called upon to reconsider its decision in McAlister Urban Renewal Authority v. Hamilton, 521 P.2d 823 (Okl. 1974)m as reaffirmed in National Educators Life Ins. Co. v. Apache Lanes, Inc., 555 P.2d 600 (Okl. 1976) or, in the alternative, to determine that, while costs, including attorney fees taxed as a cost, would bear not post-judgment interest, the posting of a supersedeas bond by the obligor in and of itself triggers an obligation to pay interest.

4. On July 20, 1984, after "lengthy hearings" (Op. 2), the Court below awarded an attorney fee to two attorneys for an aggregate of thirty-two years of legal services, to be taxed against Capco as a cost of the action. Capco appealed as to the amount only. Bowline appealed from the Order of the court below approving the supersedeas bond over Bowline's objection that it contained no provision for interest. The Court of Appeals affirmed the rulings of the court below, both as to the amount of the fee and the Order approving the supersedeas bond without a provision for interest.

In support hereof, Bowline respectfully offers the following alternative arguments:

(a) 12 O.S. §968 requires that a supersedeas bond provide for interest.
(b) McAlister Urban Renewal should be overruled.
(c) 12 O.S. §727, as construed in McAlister Urban Renewal, violates the U.S. Constitution.

(a) 12 O.S. §968 requires that a supersedeas bond provide or interest.

12 O.S. §968 provides, in part, as follows:

"...[t]he amount of such undertaking shall be for the whole amount of the judgment or order including costs and interest on the appeal." (emphasis added)

In McAlister Urban Renewal v. Hamilton, 521 P.2d 823 (Okl. 1974), this Honorable Court held that the term "judgment" as used in 12 O.S. §727, does not include costs. Thus, an attorney fee taxed as a cost of the action would not bear interest from the date of the award until payment. While we respectfully take issue with the Court's position, the express language of §968 quoted above would seem to render the point moot, where a supersedeas bond is posted pending appeal. This language manifests a legislative intent that, even in the case of an attorney fee taxed as a cost, the Appellant must pay interest if collection was superseded by bond and the judgment is affirmed.

(b) McAlister Urban Renewal should be overruled.

McAlister Urban Renewal was, and is, erroneous. Research has revealed no other jurisdiction in the United States where an attorney fee taxed as a cost of the action would not bear post-judgment interest. Oklahoma stands alone in this anomalous interpretation of 12 O.S. §727. The notion that the term "judgment" as used in Section 727, the post-judgment interest statute, would not include costs stems from McManus v. Burrows, 206 Mo.App. 528, 23 S.W. 129, a 1921 decision of the St. Louis Court of Appeals, interpreting a 1090 Missouri statute which provided for interest on judgments in language entirely different from 12 O.S. §727. In McManus, the St. Louis Court of Appeals concluded that the words "judgment or order" as used in a Missouri's post-judgment interest statute did not include "mere incidental allowances for costs." Upon this tenuous and unique house of cards, the McAlister court construed Section 727 to exclude costs We respectfully take issue with the notion that $346,000 for thirty-two years of work is a "mere incidental." In the four years since the attorney fee was awarded, using the current rate of 9.95%, we are dealing with a profit of Capco and a loss to Bowline's attorneys of $137,708 of "incidentals." Although the amount of the attorney fees has been affirmed in toto, the fee is actually being reduced by $137,000 by the application of

McAlister Urban Renewal. There is no room for dispute that $346,000 four years ago is not the same thing as $346,000 today. As anyone can quickly discover by trying to borrow that sum interest free for four years; thus, although the trial court's fee determination has been ruled absolutely correct, that decision will not be carried out because there is no way to pay the money four years ago!

Even Missouri now takes a different view. In Johnson v. Mercantile Trust, 510 S.W.2d 33 (Mo. 1974), the Missouri Supreme Court, although not specifically overruling McManus, stated:

"He who has the use of another's money, or money he ought to pay, should pay interest on it."

If the Missouri's Supreme Court's quote in Johnson v. Mercantile Trust, supra., reflects an axiom of equity, McAlister Urban Renewal is therefore, by definition, inequitable.

McManus aside, McAlister Urban Renewal is simply wrong. The cornerstone of the decision is the assumption that the taxation of costs is not a part of the judgment itself. A judgment is defined in 12 O.S. §681 as follows:

"A judgment is the final determination of the rights of the parties in action. One of those rights spelled out by statute is the right of the prevailing party in certain actions to recover an attorney fee."

Even decisions of this Honorable Court before McAlister Urban Renewal would indicate that costs would be included as a part of the judgment and would thus bear interest. See, for example, Dixon v. Peacock, 33 Okl. 87, 141 Pac. 429 (1914), in which this Honorable Court held that a judgment that the costs of the action be taxed against the Defendants was the equivalent of "adjusting the costs" against the Defendant and, therefore, came within 12 O.S. §681. An order taxing costs is clearly a judgment, as defined by the legislature.

In any event, 12 O.S. §933 would seem to settle the matter decisively. It provides:

"The several clerks of the district court shall tax the costs in each case, and insert the same in their respective judgments..." (emphasis added)

It is evident from the language employed by the legislature in this statute that, following insertion of the costs into the judgment, the costs become a part thereof, and would logically draw interest to the same extent as the rest of the judgment. Nothing in 12 O.S. §727 evidences a legislative intent to exclude interest on costs.

McAlister Urban Renewal also frustrates and violates Oklahoma public policy by encouraging frivolous appeals. Capco has been rewarded by this Court $137,708 for prosecuting its merit less appeal.

(c) 12 O.S. §727 as interpreted in McAlister Urban Renewal, violates the U.S. Constitution.

(i) Due Process - The Constitutional guarantee of procedural due process of law embodies an obligation to resolve the conflict in a manner "consistent with essential fairness." Lassiter v. Dept. of Social Services, 68 L.Ed2d 640, 101 S.Ct. 2153 (1981); Hanna v. Larche, 363 U.S. 424, L.Ed.2d 1307, 80 S.Ct. 1502. It is respectfully submitted that a system in which one litigant cannot lose, and the other litigant cannot win, regardless of the decision of the Court on the merits, is, by definition, fundamentally unfair. Capco's four-year attack on the attorney fee awarded below, was totally unsuccessful.. Nevertheless, Capco has profited $137,708 and Bowline's attorneys have lost that sum. The affirmance means that Capco should have paid the $346,000 attorney fee on July 20, 1984. It did not do so and Bowline was precluded by 12 O.S. §968 from collecting the judgment, pending appeal. Once that bond was posted, Capco could not lose, even if the decision was totally affirmed. Thus, this Honorable Court's interpretation of 12 O.S. §727, has established a system whereby a debtor under a judgment for costs is guaranteed

financial gain by the prosecution of an appeal and the appellee is guaranteed financial loss, and no ruling of the Appeal Court on the merits can alter those guarantees. That is fundamentally unfair and does violence to the Fifth Amendment to the United States Constitution. It is unthinkable that the U.S. Supreme Court would ever approve a state court appeals system in which a successful litigant is guarantee financial loss.
(ii) Equal Protection - 12 O.S. §727, as construed in McAlister, violates the equal protection clause, by creating two classes of appellees - attorneys and everyone else. There is no rational basis for this classification and no legitimate legislative objective can even be hypothesized. The traditional test for denial of equal protection requires that the Court ascertain the basis of the classifications, the governmental objective purportedly advanced by the separate classifications, and then make a comparison between the classification and the objective to the achievement of any legitimate legislative purpose that a court can only conclude that the legislature's actions were irrational. In the present instance, it is not the statute itself, but a construction thereof imposed thereon by this Honorable Court in McAlister Urban Renewal which yields the unequal treatment.

No legitimate legislative objective can be fathomed which would induce the legislature to allow all judgment creditors except beneficiaries of an award of attorney fees taxed as costs to bear interest. In fact, in all likelihood there was no such legislative intent, nor was the question even considered when the interest statute was enacted. We cannot help but surmise that the denial of interest on costs originated entirely in the Supreme Court.

SUMMARY OF ARGUMENT

Because the bond fails to conform with the specific language requiring a provision for interest, because McAlister Urban Renewal is so fundamentally unfair as to even violate

the federal Constitution and because it is so ill-reasoned, this Honorable Court should grant certiorari and correct the unfairness imposed upon litigants by a system in which one cannot lose, and the other cannot win.

S/_____

C. Rabon Martin
Martin & Turner
1023 West 23rd Street
Tulsa, OK 74107
(918) 587-9000

CERTIFICATE OF MAILING

This is to certify that on the _____ day of June, 1988, a true and correct copy of the foregoing instrument was mailed, postage prepaid, to the following:

S/_____

Sam P. Daniel, Esq.
G. Michael Lewis, Esq.
Doerner, Stuart, Saunders
Daniel & Anderson
1000 Atlas Life Building
Tulsa, OK 74103

S/_____

C. Rabon Martin

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Wednesday, October 19, 1988

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

66,915 Bowline Construction Company v. CAPCO Pipe Company, Inc., formerly Cement Asbestos Products Company. Both peitions for certiorari denied.
CONCUR: Doolin, C.J., Lavender, Simms, Wilson, Kauger, Summers, JJ.
DISSENT: Hargrave, V.C.J., Opala, J.

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

BOWLINE COSTRUCTION CO.,	)	
	)	
Appellant,	)	
	)	
vs.	)	
	)	
CAPCO PIPE COMPANY, INC.,	)	
formerly Cement Asbestos	)	
Products Company,	)	
	)	
Defendant.	)	No. 66,915

MOTION TO TAX ADDITIONAL COSTS

COMES NOW the Appellant, Bowline Construction Company, by and through its undersigned attorney, and moves that the Court tax additional costs for legal services rendered in defense of the attorney fee which was the subject of this action.

In Sisney v. Smalley, 690 P.2d 1048 (Okla. 1984), it was held that additional fees may be allowed to the prevailing party forlegal services rendered in the Appellate Court.

It is respectfully requested that the mandate include a direction to the trial court to conduct a hearing to determine the appropriate fee for Appellate services. In Professional Const. Consultants, Inc. v. State, Ex Rel. Grimes, 646 P.2d 1262 (Okla. 1982), it was held that attorney fees to the successful party in the appeal may be awarded either by the Supreme Court or by the trial court. Sice an evidentiary hearing will be required, it is respectfully suggested that such proceedings be conducted in the trial court. If the Supreme Court elects to set the Appellate fee, upon notification, counsel

will submit appropriate evidence to support the requested fee.

Respectfully submitted,

S/_____
C. Rabon Martin
Martin 7 Turner
1023 West 23 Street
Tulsa, OK 74107
(918) 587-9000

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of October, 1988, a true and correct copy of the foregoing instrument was mailed, postage prepaid thereon, to the following:

G. Michael Lewis, Esq.
Doerner, Stuart, Saunders,
Daniel & Anderson
1000 Atlas Life Bldg.
Tulsa, OK 74103

S/_____
C. Rabon Martin

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Monday, November 14, 1988

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDER:

66,915 BOWLINE CONSTRUCTION CO. V. CAPCO PIPE COMPANY, INC formerly Cement Asbestos Products Company

Appellee's motion for appeal-related counsel fees is denied.

DOOLIN, C.J., HARGRAVE, V.C.J., HODGES, LAVENDER, OPALA, WILSON and KAUGER, JJ. - Concur; SIMMS, J. - Disqualified; SUMMERS, J. - Dissents